

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY M. RICE,

Defendant-Appellant.

UNPUBLISHED

October 15, 2002

No. 225865

Wayne Circuit Court

LC No. 99-002073

Before: Murphy, P.J., and Markey and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was tried jointly with codefendant Jerome L. Knight. The prosecutor's theory was that codefendant Knight "bonded" defendant out of jail in exchange for defendant killing Knight's former girlfriend, Yahnica Hill, who was subsequently shot and killed while in her car.

In two separate issues, defendant argues that the trial court erred in denying his motion for a directed verdict, and that the evidence was insufficient to support his convictions, particularly with regard to his identity as the perpetrator. Review of a trial court's ruling on a directed verdict motion, MCR 6.419(A), is essentially a review of the sufficiency of the evidence, and this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential, and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The prosecution presented evidence that codefendant Knight had threatened to kill the victim, with whom he was involved in a dispute over the custody of their child. There was

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

evidence that codefendant Knight had previously solicited another person, Rodney Coleman, to kill “a girl” and that Knight subsequently arranged to bail defendant out of jail. According to Coleman, defendant later told Coleman that he had killed “a girl” by shooting her in the face as she sat in a parked car, which was consistent with how the victim was killed. There was also evidence that defendant either told Coleman that the girl he shot was “J.J.’s baby’s mother to be exact,” or that Coleman understood that to be what defendant meant. Viewed in a light most favorable to the prosecution, and making credibility choices in support of the jury verdict, the evidence was sufficient to identify defendant as the person who shot and killed the victim. The trial court did not err in denying defendant’s motion for a directed verdict.

Next, defendant argues that he was denied a fair trial because of an inadequate instruction on alibi. The trial court instructed the jury in accordance with CJI2d 7.4, as defendant requested. Nonetheless, defendant complains that the court erred in using the term “defendants” in the instruction, which was improper because the instruction did not pertain to codefendant Knight. Because defendant did not object to the court’s jury instruction at trial, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). The jury was instructed that the prosecution had the burden of proving that the defendants were “actually there when the alleged crime was committed,” and that it should find the defendants not guilty if it had a reasonable doubt about whether they were actually present when the crime was committed. The jury was adequately instructed on reasonable doubt and the guilty verdict implies that it would not have acquitted defendant even if a perfect defense instruction had been given. See *People v Prophet*, 101 Mich App 618, 628; 300 NW2d 652 (1980). Accepting that the alibi instruction did not apply to codefendant Knight, defendant has failed to show how the use of the word “defendants” affected his substantial rights. *Carines*, *supra*. Therefore, this unpreserved issue does not warrant reversal.

Next, defendant argues that he was denied a fair trial because of prosecutorial misconduct. Because defendant did not object to any of the challenged remarks by the prosecutor, this issue is not preserved. Therefore, we review this issue for plain error affecting defendant’s substantial rights. *Carines*, *supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor is not required to use the blandest possible terms to state her inferences and conclusions, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), and the prosecutor may use strong and emotional language in making her arguments so long as it is supported by the evidence, *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Further, a prosecutor may draw inferences from the testimony and may argue that a witness, including the defendant, is not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). Here, examined in context, each of the challenged remarks constituted fair comment on the evidence and inferences arising from the evidence. Defendant has not established plain error.

Defendant also argues that the trial court improperly allowed witness Coleman to testify that he had previously told his aunt, Stephanie Harris, and Investigator Shaw the same information that he testified about at trial, and improperly allowed Harris and Shaw to testify that they took certain actions based on what Coleman told them. The admission of evidence is

reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). There is no merit to defendant's claim that Harris' testimony that she spoke to people as a result of Coleman's statement, or that Shaw's testimony that he questioned defendant as a result of Coleman's statement, were hearsay statements. Nor was the testimony improperly allowed as a prior consistent statement of a witness, MRE 801(d)(1). Although, as defendant asserts, the definition of hearsay includes "nonverbal conduct of a person, if it is intended by the person as an assertion," MRE 801(a), here neither witness repeated the content of Coleman's statement. Moreover, neither Harris' nor Shaw's actions were offered to prove the truth of Coleman's statement, MRE 801(c), but only to explain how the investigation led to defendant Rice. The court did not abuse its discretion in allowing the testimony.

Defendant also argues that he was denied a fair trial because Coleman's testimony that he was concerned for his safety and feared for his life was irrelevant. At trial, defendant objected to this testimony only on the basis that the prosecutor's questions were leading. Defendant's objection at trial was insufficient to preserve his present challenge to the relevancy of the evidence. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Therefore, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra*. Here, the challenged evidence was relevant to Coleman's credibility, which was very much at issue. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Defendant has not shown that the testimony constituted plain error.

Defendant also argues that defense counsel was ineffective. Because defendant did not raise this issue in a motion for new trial or a request for an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense so as to deprive defendant of a fair trial. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). There is a strong presumption that counsel's conduct was reasonable. *Id.*

Defendant alleges that counsel was ineffective for failing to make an appropriate objection to matters previously discussed in this opinion. Because we have concluded that defendant was not prejudiced by the use of the term "defendants" in the alibi instruction, and have also rejected defendant's claims that the prosecutor engaged in improper argument and that testimony was improperly allowed, we likewise reject defendant's claim of ineffective of assistance of counsel predicated on those issues.

Defendant further argues, in propria persona, that defense counsel was ineffective for failing to object to Parneisha Jerry's testimony about voicemail tapes of codefendant Knight threatening the victim, by failing to object to Jerry's testimony as highly prejudicial and lacking factual support, by failing to seek separate trials, and by failing to request a jury instruction on multiple defendants. We disagree.

First, although counsel for defendant did not object to Parneisha Jerry's testimony, counsel for codefendant Knight did lodge an objection, which was overruled. In light of this unsuccessful objection, any objection by defendant's counsel would have been futile. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

The record reveals that, although the victim's pager was in police possession, there was no tape recording of the voice mail messages, which were deleted automatically after a period of time. In this circumstance, the content of the voice mail messages could be proven by other means, i.e., through Jerry's testimony. MRE 1004. Further, Jerry's testimony established that she had known codefendant Knight for three or four years, had spoken to him "numerous times," and had heard his voice on the telephone about forty times. This was sufficient to establish a foundation for Jerry's testimony that she recognized codefendant Knight's voice when she listened to the recorded messages. MRE 901(a) and (b)(5). Additionally, there was no hearsay violation because if the statements testified to by Jerry even qualified as hearsay under MRE 801(c), they fit the "excited utterance" exception, MRE 803(2), and the "then existing mental or emotional condition" exception, MRE 803(3). Thus, counsel was not ineffective for failing to object to the testimony. With regard to defendant's argument that counsel was ineffective by failing to object to Jerry's testimony as highly prejudicial and lacking factual support, defendant fails to reference any trial testimony in direct support of the argument, and we decline to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Defendant also argues that counsel was ineffective for failing to demand separate trials so that the evidence of the voicemail tapes could not have been used against him. The record reveals that defense counsel initially requested separate trials, but then withdrew the request because there was no evidence that the defenses would be antagonistic. There is no reason to conclude, and defendant presents no authority to suggest, that the res gestae evidence of the reasons behind the killing would not have been admissible at separate trials. Counsel's decision to withdraw his motion was a matter of trial strategy, which this Court will not second guess. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant also argues that counsel was ineffective for failing to request a jury instruction on multiple defendants, CJI2d 2.19, which instructs that "if any evidence was limited to one defendant, you should not consider it as to any other defendants." Contrary to defendant's claim, the evidence in this case, including the testimony of Ms. Perry, involved the res gestae of the crime and was properly considered against defendant. Counsel was not ineffective for failing to request the instruction.

Finally, defendant argues that counsel was ineffective because of the cumulative effect of the multiple errors in this case. Because no errors have been found with regard to any of defendant's challenges, there can be no cumulative effect *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999); *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Roman S. Gribbs